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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 DANIEL EDWARD CHOVAN,
14 Defendant.

Case No. 10cr1805 JAH

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS COUNT 1
OF THE INDICTMENT [Doc. No.
17-2, 17-3, 17-4]

15 INTRODUCTION

16 Defendant, Daniel Edward Chovan moved to dismiss the indictment. The motion
17 was fully briefed by the parties. After a thorough review of the parties' submissions and
18 oral arguments, for the reasons set forth below and in conjunction with the order issued
19 on the record, this Court DENIES Defendant's motion to dismiss.

20 BACKGROUND

21 On April 16, 2010, Defendant was arrested and charged with possession of a
22 firearm by a person previously convicted of a misdemeanor crime of domestic violence.
23 The government filed a complaint on April 19, 2010, and a federal grand jury returned a
24 two count indictment on May 12, 2010, charging defendant with a violation of 18 U.S.C.
25 § 922(g)(9), Prohibited Person in Possession of a Firearm, and a violation of 18 U.S.C. §
26 924(d), False Statement in Acquisition of a Firearm. Defendant was arraigned on the
27 indictment on May 13, 2010 and entered a not guilty plea. The instant motion was filed
28 on June 8, 2010. The government filed its response to the motion on June 14, 2010.

Defendant filed a declaration in support of his motion to dismiss on June 21, 2010. Both parties appeared before this Court on June 21, 2010 for a hearing on the motion. On June 28, 2010, the government filed a supplemental brief in opposition to Defendant's motion to dismiss, and on July 12, 2010, Defendant filed his supplemental reply. After an additional brief hearing, this Court issued its order on the record on July 19, 2010.

DISCUSSION

Defendant moves to dismiss the indictment on the grounds that (1) Defendant's Second Amendment rights were violated; (2) Defendant's civil rights were restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii); and (3) Defendant's equal protection rights were violated by 18 U.S.C. § 922(g)(9).

I. Violation of Second Amendment Rights

Defendant argues the indictment violated his individual fundamental right to bear arms for self defense, and any infringement of that right must pass strict scrutiny.¹ In District of Columbia v. Heller, the Supreme Court held that the Second Amendment guarantees the individual right to possess and carry weapons for the purpose of self-defense. 128 S.Ct. 2783, 2817 (2008). However, the Court also held that this Second Amendment guarantee is not an unrestricted right, stating that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Id. at 2816-17. The Court noted that the presumptively lawful regulatory measures listed were only examples and that the list was not exhaustive. Id. at 2817 n.26. Thus, the Court found that there is an individual right to possess firearms, but this right is not extended to those who are disqualified. Id. at 2822.

The Ninth Circuit considered the impact of Heller in United States v. Vongxay, 594

¹ Defendant contends that this Court should apply strict scrutiny because the Second Amendment sets out a fundamental right. Doc. No. 17-1 at 9. As discussed below, Defendant falls within an exemption from the Second Amendment right to bear arms because section 922(g)(9) is longstanding and a presumptively lawful regulatory measure. Thus, this Court finds it unnecessary to address Defendant's contention that a strict scrutiny analysis should apply.

1 F.3d 1111 (9th Cir. 2010). In Vongxay, the defendant claimed that 18 U.S.C. §
 2 922(g)(1) violated his Second Amendment right. Id. at 1111. The Ninth Circuit in
 3 Vongxay held that Heller's "presumptively lawful regulatory measures" language
 4 recognized statutes such as section 922(g)(1) as an exception to the Second Amendment
 5 right to possess firearms, and therefore the defendant was disqualified from the exercise
 6 of Second Amendment rights. Id. at 1115. In addition, the Ninth Circuit noted that at
 7 the time of its decision, February 9, 2010, no court examining Heller has found 18 U.S.C.
 8 § 922(g) to be constitutionally suspect. Id. (citing United States v. Baron, 2008 WL
 9 5102307, at *2 (E.D.Wash. Nov. 25, 2008). The Ninth Circuit held that section
 10 922(g)(1) did not violate a felon's Second Amendment right. Id. at 1118.

11 Defendant, a misdemeanor, argues that Vongxay does not apply in this case
 12 because the defendant in Vongxay was a felon, unlike the instant case. Doc. No. 17-1 at
 13 8. Defendant also argues that the restriction in section 922(g)(1) enacted in 1968, is not
 14 longstanding thus section 922(g)(9), enacted in 1996, is arguably not longstanding. Id.²

15 The government, in opposition, argues that section 922(g)(9) is longstanding
 16 pursuant to the rationale in Heller. Doc. No. 18 at 11. The government further argues
 17 that section 922(g)(9) is a presumptively lawful regulatory measure because Congress
 18 passed section 922(g)(9) as an extension of section 922(g)(1) to "close this dangerous
 19 loophole and keep guns from violent individuals who threaten their own families." Id.
 20 (quoting 142 Cong. Rec. 22986 (1996) (statement of Sen. Lautenberg)).

21 The government also relies on the longstanding history of the right of the
 22 government to regulate gun possession to justify the prohibition of possession of a firearm
 23 by a domestic violence misdemeanor. Id. at 12. The government maintains the Supreme

24
 25 ² In addition, Defendant argues that the presumptively lawful regulatory measures language
 26 is dicta thus, it cannot control in this case. Doc. No. 17-1 at 8. This Court will not address this issue
 27 as the Supreme Court and the Ninth Circuit have disposed of it. See, McDonald v. Chicago, --- S.Ct.
 28 ---, 2010 WL 25551888 (June 28, 2010), clarifying that the holding in Heller does not "cast doubt on
 such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and
 the mentally ill.'" Id. at *25); Vongxay, 544 F.3d at 1116 (the presumptively lawful regulatory
 measures language was not dicta because "[c]ourts often limit the scope of their holdings, and such
 limitations are integral to those holdings").

1 Court found the legislative history supporting the enactment of section 922(g)(9)
 2 persuasive in United States v. Hayes, 129 S.Ct. 1079 (2009).³ The Hayes Court found
 3 that Congress enacted section 922(g)(9) because “existing felon-in-possession laws . . .
 4 were not keeping firearms out of the hands of domestic abusers, because ‘many people who
 5 engage in serious espousal or child abuse ultimately are not charged with or convicted of
 6 felonies.’” Id. at 1087 (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen.
 7 Lautenberg)). The Court reasoned that Congress’ concern was well placed in that section
 8 921(a)(33)(A) clearly states, “the use or attempted use of physical force, or the threatened
 9 use of a deadly weapon,” is an element of a misdemeanor crime of domestic violence. Id.
 10 at 1084. Therefore, the Hayes Court recognized that Congress extended “the federal
 11 firearm prohibition to persons convicted of ‘misdemeanor crime[s] of domestic violence,
 12 . . . ‘to close this dangerous loophole.’” Id. at 1087 (quoting 142 Cong. Rec. at 22986
 13 (1996) (statement of Sen. Lautenberg)).

14 Recently, the Seventh Circuit in United States v. Skoien, --- F.3d ---, 2010 WL
 15 2735747 (7th Cir. 2010) addressed whether a misdemeanor like the one in this case is a
 16 presumptively lawful regulatory measure and whether its enactment is an extension of the
 17 longstanding prohibition on the possession of firearms. In its analysis, the Seventh Circuit
 18 initially points to the Federal Firearms Act, enacted in 1938, which was the first federal
 19 statute disqualifying felons and misdemeanants convicted of violent offenses from
 20 possessing firearms. Id. at *2. The Seventh Circuit in reference to section 922(g)(1),
 21 states:

22 If such a recent extension of the disqualification to non-violent
 23 felons (embezzlers and tax evaders, for example) is presumptively
 24 constitutional, as Heller said in note 26, it is difficult to condemn
 section 922(g)(9), which like the 1938 Act is limited to violent

25 ³ The defendant in Hayes was convicted of a misdemeanor of domestic violence. 129 S.Ct.
 26 at 1083. The police after responding to a 911 call reporting domestic violence found a gun in the
 27 house and defendant was subsequently charged under section 922(g)(9) for unlawful possession of
 28 a firearm. Id. The defendant argued that his domestic violence conviction did not qualify as a
 predicate offense for section 922(g)(9) because West Virginia’s law was a “generic battery
 proscription not a law designating a domestic relationship between offender and victim as an element
 of the offense.” Id. The Supreme Court in Hayes held that for the predicate offense there need not
 be a domestic relationship in order to preserve Congress’ intent. Id. at 1089.

1 crimes. It would be weird to say that section 922(g)(9) is
2 unconstitutional in 2010 but will become constitutional in 2043,
3 when it will be as 'longstanding' as section 922(g)(1) was when
4 the Court decided Heller.

5 Id. The court observed that "many aggressors end up with no conviction, or a
6 misdemeanor conviction, when similar violence against a stranger would produce a felony
7 conviction." Id. at *5. The court also emphasized that there is a continuing threat of
8 danger because the recidivism rates are high for domestic violence aggressors. Id. at *6.
9 Thus, the Seventh Circuit held that section 922(g)(9) is a longstanding prohibition and
10 a presumptively lawful regulatory measure. Id. at *3. This Court finds the Seventh
11 Circuit's reasoning persuasive. Section 922(g)(9) is a presumptively lawful prohibition
12 and represents an exemption from the right to bear arms under the Second Amendment
13 as articulated in Heller.

14 In the instant case, sometime after Defendant suffered a misdemeanor conviction
15 for domestic violence, law enforcement officers found firearms in Defendant's home upon
16 responding to a call of a domestic abuse incident on March 29, 2010. Doc. No. 18 at 2.
17 At that time, Defendant's wife told the officers that Defendant struck her with a cell
18 phone and that she feared leaving the Defendant because "he had previously threatened
19 to hunt her down and shoot her if she ever left him." Id. Despite the results of the
20 investigation, Defendant states that his primary purpose for possessing the guns is self-
21 defense. Doc. No. 20-1 at 1. Defendant declares that he lives in a rural area that is not
22 routinely patrolled by the police; there have been several break-ins in the area in the past
23 few years; and there is a lot of wildlife in the area, including coyotes, mountain lions, and
24 rattlesnakes. Id. However, the government provides several videos depicting the
25 Defendant firing guns as well as acting as a firearms instructor to an unidentified female
26 posted on <http://www.YouTube.com>, along with the investigative reports in this case, to
27 refute Defendant's alleged purpose for possession.

28 In light of the record in this case, Defendant's arguments and position regarding the
purpose for which he possessed the firearms are not persuasive. Congress' intent in
passing section 922(g)(9) was to protect citizens from individuals like Defendant.

1 Accordingly, Defendant's motion to dismiss is **DENIED**.

2 **II. Restored Civil Rights**

3 Defendant argues the indictment should be dismissed because his civil rights were
4 restored pursuant to operation of California law. Defendant contends he retained his right
5 to vote, right to serve on a jury, and the right to hold public office when convicted of
6 domestic violence in California. Doc. No. 17-1 at 10. Defendant further contends that,
7 even though his right to possess firearms had been taken away ten years ago, the right was
8 restored before his arrest in this case. Id. at 11. Defendant argues that he is not subject
9 to prosecution under section 922(g)(9) because his civil rights have been restored under
10 section 921(a)(33)(B)(ii). Id.

11 The government, relying on Logan v. United States, 552 U.S. 23 (2007) and
12 United States v. Valerio, 441 F.3d 837 (9th Cir. 2006), argues that the restoration of the
13 right to possess firearms is not sufficient to satisfy the test for the restoration of civil rights
14 under section 921(a)(33)(B)(ii). Doc. No. 18 at 16 (quoting Logan, 552 U.S. at 28 (right
15 to possess firearms was not considered a civil right); Valerio, 441 F.3d at 843). The
16 government also argues that Defendant has not had his civil rights restored because the
17 retention of rights is not equal to a restoration of rights pursuant to Logan. Id. Therefore,
18 the government contends, Defendant is not within the reach of section 921(a)(33)(B)(ii)
19 and thus, is subject to prosecution under section 922(g)(9). Doc. No. 18 at 16.

20 Under section 921(a)(33)(B)(ii) a person will not be considered to have been
21 convicted of a misdemeanor of domestic violence if such conviction "has been expunged
22 or set aside, or is an offense for which the person has been pardoned or has had civil rights
23 restored." 18 U.S.C. § 921(a)(33)(B)(ii).

24 The Court in Logan instructs that to determine whether a defendant's civil rights
25 have been restored when a defendant's conviction falls within the presumptively lawful
26 regulatory measure exception to Second Amendment protection, the court should consider
27 three civil rights: the right to vote, the right to sit on a jury, and the right to hold public
28 office. Logan, 552 U.S. at 28; Valerio, 441 F.3d at 843.

1 In Valerio, the defendant appealed his felon in possession conviction, claiming he
2 was never convicted under New Mexico law as a result of the deferred imposition of his
3 sentence and its subsequent discharge under state law. Valerio, 441 F.3d at 839. The
4 defendant in Valerio argued that the restoration of his right to vote and the right to
5 possess firearms invalidated his state conviction. Id. at 841-42. In support of his
6 argument, the defendant relied upon the opinion of the New Mexico Attorney General
7 which stated that “persons in Valerio’s situation were entitled to possess firearms under
8 the federal statute.” Id. at 842. Notwithstanding, the Ninth Circuit held that the
9 defendant’s civil rights had not been restored. Id. The court noted that “[c]ircuit law
10 establishes that the restoration of civil rights must be more than de minimis and ‘must be
11 substantial but need not be complete.’” Id. (quoting United States v. Herron, 45 F.3d 340,
12 342 (9th Cir. 1995)). The Ninth Circuit found that the restoration of the right to vote
13 is insufficient to amount to a restoration of civil rights and that the New Mexico Attorney
14 General’s analysis was incorrect because it “treats restoration of the right to vote as
15 sufficient for the federal statutory phrase, ‘has had civil rights restored,’ but the federal
16 cases do not.” Id.

17 The Ninth Circuit also held that the restoration of Valerio’s right to possess
18 firearms was not sufficient because the three civil rights that are considered in the
19 restoration of civil rights analysis does not include the right to possess firearms. Id. at 843.
20 Furthermore, the court pointed to the fact that “Congress meant to keep guns away from
21 all offenders who, the Federal Government feared, might cause harm, even if those persons
22 were not deemed dangerous by the state” because this right is directly related to a felon’s
23 future dangerousness. Id. at 842-43.

24 The defendant in Logan, was convicted of being a felon in possession of a firearm,
25 and received an enhanced sentence under the Armed Career Criminal Act (“ACCA”).
26 Logan, 552 U.S. at 26. The defendant argued that his civil rights had been restored
27 because he retained his three civil rights: the right to vote, the right to sit on a jury, and
28 the right to hold public office. Id. However, the Supreme Court held that the 18 U.S.C.

§ 921(a)(20)⁴ “exemption provision does not cover the case of an offender who retained civil rights at all times.” Id. The Court explained that the word “restore” follows its ordinary meaning: “to give back something that had been taken away.” Id. at 31. Thus, Logan, who retained all his rights, had nothing restored to him. Id. The defendant in Logan also argued that retained civil rights should be treated as restored civil rights, otherwise “less serious offenders will be subject to ACCA’s enhanced penalties while more serious offenders in the same State, who have had civil rights restored, may escape heightened punishment.” Id. at 31. The Court dismissed this argument because: it does not solve all possible anomalies; the Court cannot repair such a congressional oversight or mistake, assuming that it is; and 18 U.S.C. § 921(a)(33)(B)(ii), which tracks section 922(g)(9), differentiates between “restored” and “retained” and “[i]t is more than ‘conceivable’ that the Legislature, albeit an earlier one, . . . meant to do the same in section 921(a)(20).” Id. at 36-37. This Court finds Logan and Valerio controlling.

Here, the Defendant only had his right to possess firearms restored which would be insufficient under the restoration of civil rights analysis. See Valerio, 441 F.3d at 843. The retention of his civil rights is not the same as the restoration of his civil rights. See Logan, 552 U.S. at 31. Therefore, Defendant has not had his civil rights restored and Defendant’s motion to dismiss is **DENIED**.

III. Violation of Equal Protection

Defendant seeks dismissal of the indictment because it violates his right to equal protection. The Equal Protection Clause of the Fourteenth Amendment prohibits the government from “treating differently persons who are in all relevant respects alike.” Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Generally, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” Id. (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)).

Defendant argues that section 922(g)(9) violates the guarantee of equal protection

⁴18 U.S.C. § 921(a)(20) excludes from qualification for enhanced sentencing any convictions for which the offender has his civil rights restored. Logan, 552 U.S. at 23.

1 because it prohibits Defendant from possessing a firearm based on his misdemeanor
2 conviction, while at the same time allowing others, convicted of similar or more serious
3 offenses in other states, to possess firearms. Doc. No. 17-1 at 11. To illustrate his
4 contentions, Defendant provides a comparison of California law to other states that
5 provide convicted felons automatic, or near-automatic restoration of the right to possess
6 firearms. Id. at 12-13. Defendant also contends that the governor's pardon is the only
7 possible way for Defendant to restore his Second Amendment rights in California pursuant
8 to section 921(a)(33)(B)(ii), but this is almost never granted. Id. at 12. Defendant
9 contends that section 921(a)(33)'s exceptions based upon pardon, expungement, or
10 restoration of civil rights vary in their application among the various states. Id.
11 Defendant argues this Court should apply strict scrutiny to his equal protection challenge.
12 Id. at 11.

13 The government argues that in Vongxay, the Ninth Circuit addressed a similar claim
14 regarding section 922(g)(1) and rejected the claim based on pre-Heller precedent. Doc.
15 No. 18 at 16. The Ninth Circuit states that it is bound by pre-Heller law even if the
16 reasoning upon which those cases was based—that there is no individual right to bear arms—
17 was invalidated by Heller. Vongxay, 594 F.3d at 1116. The Ninth Circuit reasons that
18 the “doctrine of *stare decisis* concerns the *holdings* of previous cases, not the rationales.” Id.
19 (quoting In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996)). The Ninth Circuit held that
20 the Supreme Court in Heller set an exception to the Second Amendment right for anyone
21 disqualified by a presumptively lawful regulatory measure, such as felons. Id. at 1115.
22 Thus, those disqualified by a presumptively lawful regulatory measure do not have an
23 individual right to possess firearms under the Second Amendment and the rationale does
24 not change from that contained in pre-Heller precedent.

25 The government also asserts that the Ninth Circuit holding in United States v.
26 Hancock, 231 F.3d 557 (9th Cir. 2000) is applicable here. In Hancock, the Ninth Circuit
27 held that “the discrepancy in treatment of which the defendant complained was the
28 inevitable result of Congress’ reference to state law” and section 922(g)(9) did not violate

1 equal protection because section 921(a)(33)(B)(ii) provided a means to regain one's right
2 to possess firearms. Doc. No. 18 at 16 (quoting Hancock, 213 F.3d at 567). Therefore,
3 the government argues, Defendant's argument must fail. Id. at 17.

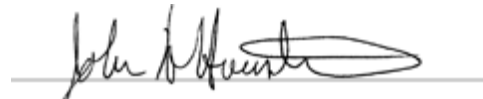
4 This Court agrees with the United States. Defendant's equal protection argument
5 is without merit based upon the law of this Circuit.

6 Accordingly, Defendant's motion to dismiss due to a violation of his equal
7 protection rights is **DENIED**.

8 **CONCLUSION AND ORDER**

9 Based on the foregoing, and in conjunction with the order issued on the record, **IT**
10 **IS HEREBY ORDERED** that Defendant's motion to dismiss Count 1 of the indictment
11 [Doc. No. 17-2, 17-3, 17-4] is **DENIED**.

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14 DATED: August 10, 2010

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16 JOHN A. HOUSTON
17 United States District Judge
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